COURT OF APPEALS
DECISION
DATED AND FILED

March 18, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-3400

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT II

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

KATHLEEN A. KROGMAN,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Walworth County: JOHN R. RACE, Judge. *Affirmed.*

ANDERSON, J. Kathleen A. Krogman appeals from an order finding that she unlawfully refused to submit to a chemical test of her blood in violation of § 343.305(9), STATS. Krogman claims that because the State was ultimately successful in obtaining a blood sample which may be used to assist in the prosecution of an operating a motor vehicle while intoxicated charge, it was inequitable to punish her with the penalties of the refusal as well. She further

maintains that the State informed her of a right to refuse, but then negated this right by forcibly taking blood from her person in violation of her due process rights. We are unpersuaded by either argument. We therefore affirm the order.

The facts are undisputed. On June 25, 1997, Officer Timothy Otterbacher of the Walworth County Sheriff's Department arrested Krogman for operating a motor vehicle while intoxicated (OMVWI). Otterbacher transported Krogman to a local hospital for an evidentiary chemical test. After reading Krogman the Informing the Accused form, Otterbacher requested her to submit to an evidentiary chemical test of her blood. Krogman responded "no."

Otterbacher then explained to Krogman the consequences of not submitting—mandatory license revocation—and that it was her legal obligation by statute to do so. Krogman refused. Otterbacher clarified that law enforcement officers are allowed to order the test without her consent and without a search warrant and again asked her if she would voluntarily consent to the blood draw. According to Otterbacher, Krogman initially said yes, "and then she immediately within about three or four seconds said, I mean no." Eventually, a chemical blood test was taken from Krogman and Otterbacher gave her the Notice of Intent to Revoke form based upon a refusal.

A refusal hearing was held on November 7, 1997, pursuant to § 343.305(9), STATS. Krogman argued that there was not a refusal under the statutes. Alternatively, Krogman asked the trial court to vacate the judgment as inequitable because the State says "we are going to take that right [to refuse] away from you … we are going to take blood anyway and we are going to penalize you for exercising … the refusal privilege." The court first found that Krogman's no (all three) was sufficient to warrant the officer treating it as a refusal. The court

also rejected Krogman's inequitable argument: "This is an implied consent state. She refused. She bears the consequences…. I decline your offer to set this judgment aside as being inequitable …. I'll make a finding indeed this refusal was unreasonable." Krogman appeals.

The question of whether an individual refused to submit to a chemical test requires us to apply the implied consent statute to the facts of a particular case. This is a question of law that we review de novo. *See* ***Olen v. Phelps***, 200 Wis.2d 155, 160, 546 N.W.2d 176, 180 (Ct. App. 1996).

Krogman renews her argument that the refusal order in this case is inequitable because the State forcibly took blood from her person after she exercised a recognized right to refuse a chemical test. Because the State took her blood and had a chemical test result, Krogman insists "[t]o punish [her] with the penalties of the refusal serves no legitimate purpose."

Krogman's argument ignores the very purpose of the implied consent law: "to *facilitate* the gathering of evidence against drunk drivers." ***State v. Neitzel***, 95 Wis.2d 191, 203, 289 N.W.2d 828, 835 (1980) (emphasis added). Section 343.305(1), STATS., provides that anyone who drives a motor vehicle is deemed to have consented to a properly administered test to determine the driver's blood alcohol content. *See* ***State v. Rydeski***, 214 Wis.2d 101, 106, 571 N.W.2d 417, 419 (Ct. App. 1997). Once a person has been properly informed of the implied consent statute, that person must promptly submit or refuse to submit to the required test. *See* ***id.*** at 109, 571 N.W.2d at 420. If there is a refusal, the

accused is subject to the penalty provisions of the implied consent statute.[1] *See* ***Neitzel***, 95 Wis.2d at 205, 289 N.W.2d at 835. The penalty statute, § 343.305(10)(a), STATS., provides:

> If the court determines that under sub. (9)(d) that a person improperly refused to take a test … the court shall proceed under this subsection…. If a hearing was requested, the revocation period shall commence 30 days after the date of refusal or immediately upon a final determination that the refusal was improper, whichever is later.

Nowhere does the penalty portion of the statute state that a court should, or even that it can, lift the penalty if the requested chemical test was eventually obtained. Rather, applying the reasoning of ***Neitzel*** and ***Rydeski***, we conclude that the purpose behind the implied consent statute is served when an individual's refusal, once noted, subjects him or her to refusal penalties. We therefore affirm the trial court's finding that Krogman's refusal was unreasonable.

Krogman further asserts that her due process rights were violated when the State informed her of her right to refuse to submit to a chemical blood test, but then negated this right by forcibly taking blood from her person. Krogman insists that the information the law enforcement officer read to her from the Informing the Accused form explained to her the penalties she might face should she refuse the chemical blood test and that forcibly taking blood renders that recitation meaningless; such contradictory commands violate due process. We disagree.

---

[1] Krogman cites to ***County of Ozaukee v. Quelle***, 198 Wis.2d 269, 277, 542 N.W.2d 196, 199 (Ct. App. 1995), in support of her "right" to refuse to submit to a chemical test. What Krogman again ignores is the ***Quelle*** court's warning that there are certain risks and consequences inherent in refusing to submit to chemical testing. *See* ***id.*** One such consequence is revocation. *See* § 343.305(10)(a), STATS.

Krogman obfuscates the ***Bohling*** constitutional search case to the due process requirements applicable under the implied consent law. Krogman concedes that it is constitutional under ***State v. Bohling***, 173 Wis.2d 529, 494 N.W.2d 399 (1993), "for the State to have obtained a sample of [her] blood for use in the *criminal* prosecution against her." What Krogman fails to grasp is that a ***Bohling*** warrantless blood draw to obtain blood alcohol concentration (BAC) evidence is available to law enforcement agencies regardless of the existence of the implied consent law if the officer meets the ***Bohling*** criteria.[2] ***Bohling*** has no affect on Krogman's consent or refusal to submit to an implied consent test.

We agree with the State that the implied consent due process issue has been adequately addressed in ***State v. Crandall***, 133 Wis.2d 251, 259-60, 394 N.W.2d 905, 908 (1986), where the supreme court held that the information required by § 343.305(4), STATS., is all that is required to meet due process requirements. Wisconsin does not provide a constitutional or statutory right to refuse a chemical test of one's blood under the implied consent statute. *See* ***Crandall***, 133 Wis.2d at 257, 394 N.W.2d at 907. Krogman was provided all of the information that was required under the implied consent law prior to refusing

[2] In ***State v. Bohling***, 173 Wis.2d 529, 533-34, 494 N.W.2d 399, 400 (1993), the supreme court held that the dissipation of alcohol from a person's bloodstream constitutes a sufficient exigency to justify a permissible warrantless blood draw at the direction of a law enforcement officer under the following circumstances: (1) the blood draw is taken to obtain evidence of intoxication from a person lawfully arrested for a drunk driving related violation or crime, (2) there is a clear indication that the blood draw will produce evidence of intoxication, (3) the method used to take the blood sample is a reasonable one and performed in a reasonable manner, and (4) the arrestee presents no reasonable objection to the blood draw. Here, Krogman's stipulation that there was a reasonable and articulable suspicion for the stop, and that the officer had probable cause to arrest her and to ask her to take the test, satisfies the first two elements. As to the final two elements, Krogman has not contested the method in which the blood test was taken, nor did she give any reason why she could not take the test. We conclude that the ***Bohling*** criteria were met in this case.

to submit to the chemical blood test. We conclude that Krogman's due process rights were not violated.

By the Court.—Order affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)4, STATS.